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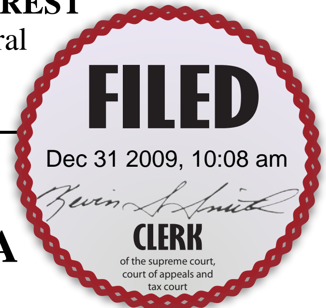

IN THE COURT OF APPEALS OF INDIANA

DONALD SALYERS,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 49A02-0904-CR-302
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Linda E. Brown, Judge
Cause No. 49F10-0803-CM-50452

December 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Donald Salyers appeals, following a jury trial, his convictions of resisting law enforcement, a Class A misdemeanor, and disorderly conduct, a Class B misdemeanor. For our review, Salyers raises two issues, which we restate as 1) whether the trial court abused its discretion by not instructing the jury on Salyers's defense to the charge of resisting law enforcement; and 2) whether Salyers's convictions violate Indiana's constitutional prohibition against double jeopardy. Concluding the trial court did not abuse its discretion in refusing Salyers's proposed instructions, but Salyers's convictions violate double jeopardy, we affirm Salyers's resisting law enforcement conviction and reverse his disorderly conduct conviction.

Facts and Procedural History

The facts supporting the judgment are as follows. On the night of March 1, 2008, Salyers went to Dear John's Pub (the "Pub") on the east side of Indianapolis. Diana Henry, the Pub's co-owner and on-duty bartender, noticed Salyers "talking real loud and kind of bothering people." Transcript at 30. Henry repeatedly told Salyers to keep his voice down, but Salyers continued to talk loudly, drawing the attention of other patrons. Henry told Salyers it was time for him to leave and escorted him toward the door. Salyers attempted to stand in the doorway and gripped the door with his fingers, which prompted Henry to call the police. After Henry and another patron fully closed the door, Salyers was left standing just outside the Pub, pacing back and forth.

A few minutes later, Indianapolis Metropolitan Police Officer Joshua Taylor responded to the scene driving a marked police car and wearing his police uniform. After

speaking with Henry, Officer Taylor asked Salyers if he had anybody to call to give him a ride home. Salyers replied he did not and stopped answering Officer Taylor's other questions. Officer Taylor asked Salyers to place his hands on the hood of a nearby pickup truck, intending to perform "a pat down for officer safety." Id. at 124. Salyers complied with Officer Taylor's request, and Officer Taylor patted Salyers down and retrieved a wallet from his back pocket.

Officer Taylor looked through Salyers's wallet for identification and, not finding any, asked Salyers to present his identification or state his name. Salyers responded, "you have my fucking wallet, you find it." Id. at 126. Officer Taylor grabbed Salyers's wrist in an attempt to handcuff him, and Salyers "pushed himself off of the truck and spun around and faced [Officer Taylor] and he took an aggressive fighting stance." Id.[1] Thereafter, Salyers began pacing back and forth, and Officer Taylor told him to calm down and place his hands behind his back. When Salyers was noncompliant, Officer Taylor sprayed his face with one blast of department-issued pepper spray which, according to Officer Taylor, had no effect on Salyers because it "deflected right off of his glasses." Id. at 127. Then Salyers "turn[ed] and faced me again and took another aggressive stance . . . and told me that I was going to have to fucking shoot him, he was not going to go to jail." Id. at 128. Then Salyers began to pace back and forth again and refused Officer Taylor's commands to turn around and put his hands behind his back. At this point, Officer Taylor radioed for backup.

[1] Officer Taylor testified Salyers, at this point, "did swing one punch at me." Tr. at 126. However, the jury acquitted Salyers of attempted battery on a law enforcement officer.

Meanwhile, two Pub patrons, John Hettinger and Dickie Atkinson, had observed Salyers's resistance to arrest. Hettinger and Atkinson rushed Salyers from behind, tackled him, and placed him on the hood of a car. As Salyers tried to push himself up off the hood, Officer Taylor approached and attempted to handcuff him. Salyers kept at least one of his arms underneath him in an attempt to resist the handcuffs. Officer Taylor then applied several elbow strikes to Salyers's shoulder blades and forearm area in an attempt to subdue him. After Officer Taylor secured a handcuff around one of Salyers's wrists, Salyers continued to resist, "[f]lailing his arms" and "trying to push himself up off of the car." Id. at 177-78. During this time, according to Officer Taylor, Salyers was "yelling . . . [l]oud enough to make the patrons in the [Pub] . . . start exiting the [Pub] to see what was going on." Id. at 139.

Officer David Dinsmore responded to the scene, and Hettinger and Atkinson backed off. After Salyers refused Officer Dinsmore's command to place both hands behind his back, Officer Dinsmore deployed his taser and "drive stun[ned]" Salyers between three and five times in the neck, shoulder, and upper back area. Id. at 178-79. The taser had no apparent effect, and Salyers continued to resist being handcuffed. After additional officers arrived, all of the officers together were able to drag Salyers onto the ground and handcuff him. Salyers offered no further resistance thereafter. Although Salyers suffered cuts and bruises to his face and head, none of the officers or civilians kicked or punched him in the face or head.

The State charged Salyers with Count 1, attempted battery on a law enforcement officer; Count 2, forcibly resisting law enforcement; and Count 3, disorderly conduct.

The case was tried to a jury on January 27, 2009. After the close of evidence, the trial court refused Salyers's proposed jury instructions on police excessive force as a defense to resisting law enforcement.[2] In closing argument, the State argued the charge of forcibly resisting law enforcement was proven by testimony Salyers resisted being handcuffed: "He pulled away, he flailed his arms. He would not comply with what the officers told him to do. And at this point he was resisting." Id. at 249. Regarding disorderly conduct, the State argued:

> Now the last charge is disorderly conduct again Donald Salyers did recklessly knowingly or intentionally engage in fighting or tremulous [sic] conduct. Now fighting is clear, he fought with the Officers. He fought with the civilians. We heard time and time again he flailed his arms, he kicked he would not give up, he fought. . . . He fought the Officers. . . . But tumultuous conduct is defined as conduct that result [sic] in or is most likely to result in serious bodily injury to a person. There are four people trying to hold this guy down. He is engaging in conduct that can hurt somebody, that can cause substantial injury to one of these people.

Id. at 250-51. Further, the State argued Salyers was guilty of disorderly conduct

> [w]hether he is fighting tumultuous conduct or whether he was making unreasonable noise and continued to do so after being asked to stop. We heard from Officers, Officer Taylor specifically and the civilian that people started to gather outside to watch. Now volume here is critical in determining what is unreasonable. People came from inside the bar outside. It's clear . . . they heard him. Officer Taylor said that the whole time . . . walking around the car yelling, Officer Taylor asking him to be quiet. The only time that he is finally quiet was once they got him in handcuffs. So for this—this statute, this charge you've got your pick. All three of them he was fighting, tumultuous conduct, a chance that somebody was going to get hurt and he made unreasonable noise.

[2] Specifically, the trial court refused Salyers's proposed jury instruction that "[i]f a police officer uses unconstitutionally excessive force in making an arrest, the officer is not lawfully engaged in the execution of his duties." Appellant's Appendix at 94. In addition, the trial court refused Salyers's proposed instruction that "[t]he rule that a citizen may not resist a peaceful, though illegal, arrest was not intended as a blanket prohibition so as to criminalize any conduct indicating resistance, where the means used to make an arrest were unlawful." Id. at 93.

Id. at 251-52. Salyers's closing argument focused on the amount of force used by the officers: "if you think that that force was excessive, then you cannot say that the Officer was lawfully engaged in the execution of his duties." Id. at 259-60.

The jury found Salyers not guilty of Count 1 but guilty of Counts 2 and 3. The trial court entered judgment of conviction accordingly and imposed concurrent sentences of 365 days on Count 2 and 60 days on Count 3, with 305 days suspended to probation. Salyers now appeals.

Discussion and Decision

I. Jury Instructions

A. Standard of Review

The proper instruction of the jury rests within the sound discretion of the trial court, and we review its decisions for an abuse of discretion. Wilson v. State, 842 N.E.2d 443, 446 (Ind. Ct. App. 2006), trans. denied. Jury instructions are to be considered as a whole and in reference to each other, and the trial court's ruling will not be reversed unless the instructions, taken as a whole, misstate the law or mislead the jury. Snell v. State, 866 N.E.2d 392, 396 (Ind. Ct. App. 2007). Further, any error in the refusal of a tendered jury instruction is subject to a harmless-error analysis: before a defendant is entitled to a reversal, he must affirmatively show the error prejudiced his substantial rights. Id.

B. Excessive Force by Police Officers

Salyers argues the trial court abused its discretion in refusing to instruct the jury on his defense to resisting law enforcement that the officers used excessive force and,

therefore, were not lawfully engaged in the execution of their duties. The purpose of a jury instruction "is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. 2003), cert. denied, 540 U.S. 1150 (2004). "A trial court erroneously refuses to give a tendered instruction, or part of a tendered instruction, if: (1) the instruction correctly sets out the law; (2) evidence supports the giving of the instruction; and (3) the substance of the tendered instruction is not covered by the other instructions given." Id. at 1164.

Salyers's tendered instructions correctly state the law. Salyers tendered the instruction that "[i]f a police officer uses unconstitutionally excessive force in making an arrest, the officer is not lawfully engaged in the execution of his duties," Appellant's Appendix at 94, which is a correct statement of the law based on this court's decision in Shoultz v. State, 735 N.E.2d 818, 823 (Ind. Ct. App. 2000), trans. denied. Salyers also tendered the instruction that "[t]he rule that a citizen may not resist a peaceful, though illegal, arrest was not intended as a blanket prohibition so as to criminalize any conduct indicating resistance, where the means used to make an arrest were unlawful." Appellant's App. at 93. This instruction also follows Shoultz, 735 N.E.2d at 823, quoting Casselman v. State, 472 N.E.2d 1310, 1316 (Ind. Ct. App. 1985). However, unlike in Shoultz, where the evidence showed the defendant began to forcibly resist the officer only after the officer used force against the defendant, here, the officers' use of force against Salyers followed his resistance to their attempts to handcuff him.

In general, "a defendant in a criminal case is entitled to have the jury instructed on any theory of defense that has some foundation in the evidence," even if the evidence is weak and inconsistent. Howard v. State, 755 N.E.2d 242, 247 (Ind. Ct. App. 2001). Therefore, Salyers was entitled to a jury instruction on police excessive force if there was some evidence the officers' use of force was excessive, that is, objectively unreasonable under the Fourth Amendment in light of the facts and circumstances confronting the officers. See Shoultz, 735 N.E.2d at 823-24 (citing Graham v. Connor, 490 U.S. 386, 395-97 (1989)). When considering whether police force is unreasonable, courts consider various factors including "the severity of the crime at issue"; "whether the suspect poses an immediate threat to the safety of the officers or others"; whether the suspect "is actively resisting arrest"; whether the suspect is threatening force or violence; whether the officer resorts to forceful means only after verbal and non-forceful means of securing the suspect have been resisted; and whether the officer complies with a police department's "sound guidelines for the use of force." See id. at 824.

Consideration of these factors leads to the conclusion Salyers's defense of excessive force was not supported by the evidence. After Officer Taylor initially attempted to handcuff Salyers, Salyers "pushed himself off of the truck and . . . took an aggressive fighting stance." Tr. at 126. Officer Taylor ordered Salyers to place his hands behind his back, but Salyers refused and continued to pace back and forth. Only then did Officer Taylor use pepper spray in an attempt to subdue Salyers. Salyers then told Officer Taylor "that I was going to have to fucking shoot him, he was not going to go to jail." Id. at 128. Salyers's actions and words conveyed to a reasonable officer in Officer

Taylor's position that Salyers was prepared to use violent means to resist arrest, such that continued police force was necessary and justified to subdue Salyers. Officer Taylor called for backup, tried again to handcuff Salyers, and only when Salyers continued to resist did he elbow-strike Salyers in the shoulder blades and forearm area. Officer Dinsmore arrived on the scene, gave Salyers further verbal commands to stop resisting, and only when Salyers failed to comply did he resort to tasing Salyers. Salyers did not cease resisting until he was pulled to the ground and handcuffed by four police officers. Salyers did not dispute the officers' testimony regarding this sequence of events, and there is no evidence that any of the officers or civilians struck Salyers in the head, used potentially lethal force, or contravened police department policies on the use of force.

Salyers relies on Wilson v. State, but in that case, an excessive force instruction was supported by evidence the police officers fired multiple gunshots in the defendant's direction while executing an arrest warrant and began doing so before the defendant drove away in his vehicle. 842 N.E.2d at 448. Here, by contrast, there is no evidence the officers used force that was disproportionate to the situation, and therefore, the evidence does not support Salyers's tendered instructions on police excessive force. As a result, the trial court did not abuse its discretion in refusing the instructions.

II. Double Jeopardy

A. Standard of Review

Article 1, section 14 of the Indiana Constitution provides: "No person shall be put in jeopardy twice for the same offense." Whether multiple convictions constitute double jeopardy in violation of article 1, section 14 is a question of law. Goldsberry v. State,

821 N.E.2d 447, 458 (Ind. Ct. App. 2005). Therefore, appellate courts review the question of double jeopardy de novo, at least in the absence of any finding by the trial court. Spears v. State, 735 N.E.2d 1161, 1166 (Ind. 2000).

B. Forcibly Resisting Law Enforcement and Disorderly Conduct

Salyers argues his convictions of both forcibly resisting law enforcement and disorderly conduct constitute double jeopardy under the actual evidence test. Two or more convictions are the "same offense" in violation of article 1, section 14 "if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis in original). To prevail under the actual evidence test, "a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id. at 53. When applying the actual evidence test, a reviewing court identifies the essential elements of each challenged offense and "evaluate[s] the evidence from the jury's perspective, considering where relevant the jury instructions, argument of counsel, and other factors that may have guided the jury's determination." Spivey v. State, 761 N.E.2d 831, 832 (Ind. 2002).

Here, the essential elements of the State's case against Salyers were set forth in the charging informations that were presented to the jury in its final instructions. To convict Salyers of forcibly resisting law enforcement, the State had to prove beyond a reasonable

doubt that he “knowingly” and “forcibly resist[ed], obstruct[ed], or interfere[d] with Joshua Taylor, and/or David Dinsmore, law enforcement officers” while the officers “were lawfully engaged in the execution of their duties.” Appellant’s App. at 104; see Ind. Code § 35-44-3-3(a)(1). To convict Salyers of disorderly conduct, the State had to prove beyond a reasonable doubt that he, “recklessly, knowingly, or intentionally,” “engage[d] in fighting or in tumultuous conduct” or “made unreasonable noise, and continued to do so after being asked to stop.” Id. at 105; see Ind. Code § 35-45-1-3(a). Because the jury was instructed it could convict Salyers of disorderly conduct based on either unreasonable noise or fighting and tumultuous conduct, we examine both prongs of the charge and the evidence relevant thereto.

1. Unreasonable Noise

The State argues no double jeopardy violation occurred because the evidence at trial showed Salyers made unreasonable noise and did so after being asked to stop, thus proving the elements of disorderly conduct by facts separate from Salyers’s forcible resistance of the officers. We disagree. Although the jury was presented with evidence that Salyers was noisy both inside the Pub and during his confrontation with the officers, the evidence was at best equivocal that Salyers made a level of noise that was unreasonable and did so after being asked to stop.

As to Salyers’s noise inside the Pub, all three witnesses – Henry, Hettinger, and Atkinson – testified Salyers was talking louder than other patrons, thereby drawing attention and causing an annoyance. To support a conviction for disorderly conduct based upon unreasonable noise, the State must show not only that the defendant made

noise but that the complained-of speech infringed upon the right to peace and tranquility enjoyed by others by producing decibels of sound that were too loud for the circumstances. Whittington v. State, 669 N.E.2d 1363, 1367 (Ind. 1996); Hooks v. State, 660 N.E.2d 1076, 1077 (Ind. Ct. App. 1996), trans. denied. In Whittington, our supreme court noted that a loud noise could be found unreasonable where it agitates witnesses and disrupts police investigations, makes coordination of investigations and medical treatment more difficult, or is annoying to others present at the scene. 669 N.E.2d at 1367. Thus, the unreasonableness of a noise depends upon the facts and circumstances surrounding the incident. Here, Salyers spoke loudly while inside a pub, a place where some degree of noise, rather than quiet or tranquility, is normally expected. Cf. Radford v. State, 640 N.E.2d 90, 93 (Ind. Ct. App. 1994) (noting defendant's conduct occurred in the quiet hallway of a hospital), trans. denied. Further, the State in its closing argument did not point to Salyers's noisiness inside the Pub as a basis for disorderly conduct. For these reasons, we do not think it likely the jury relied upon Salyers's noise inside the Pub as the basis for his conviction.

As to Salyers's noisiness outside the Pub after Officer Taylor arrived, the State points to Officer Taylor's testimony Salyers was "yelling . . . [l]oud enough to make the patrons in the [Pub] . . . start exiting the [Pub] to see what was going on." Tr. at 139. However, assuming for argument this testimony showed Salyers made unreasonable noise, the evidence was at best equivocal that Salyers received a specific command to quiet down and thereafter continued to yell loudly. On direct examination, Officer Taylor testified he told Salyers to be quiet, but on cross-examination, testified he gave

Salyers "loud verbal commands for him to stop resisting," rather than a specific command to stop making noise. Id. at 161-62. Further, Officer Dinsmore, when asked whether Salyers was saying anything when he responded to the scene, testified he did not recall Salyers saying anything. Thus, the jury was presented with conflicting evidence as to whether Salyers made unreasonable noise during his altercation with the officers and did so after receiving an official command to stop. For these reasons, we conclude the jury likely did not convict Salyers of disorderly conduct based on the unreasonable noise prong of the charge.

2. Fighting or Tumultuous Conduct

Next, the State argues no double jeopardy violation occurred because even assuming the jury convicted Salyers of disorderly conduct based on the fighting or tumultuous conduct prong of the charge, the State proved that conduct by facts separate from Salyers's forcible resistance of arrest. We disagree. "Tumultuous conduct" is "conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property." Ind. Code § 35-45-1-1. Salyers's conduct inside the Pub did not rise to the level of fighting or tumultuous conduct because, although he attempted to plant himself in the doorway and hold onto the door, there is no evidence he acted violently or in a manner likely to cause serious personal injury or property damage.

The only evidence presented to the jury that Salyers engaged in fighting or tumultuous conduct was his actions after Officer Taylor arrived and attempted to handcuff him. At that point, Salyers performed a continuous sequence of actions calculated to resist arrest: he pulled his arms away from Officer Taylor and assumed a

"fighting stance," tr. at 126; refused Officer Taylor's commands to put his hands behind his back; flailed his arms and attempted to push himself away from the car while Officer Taylor and then Officer Dinsmore attempted to handcuff him; and continued to refuse the officers' commands to present his arms for handcuffing. On appeal, the State argues each of these actions was sufficiently distinct that the jury could have relied upon some to convict Salyers of forcibly resisting law enforcement and others to find he engaged in fighting or tumultuous conduct, thus avoiding a double jeopardy violation. However, in its closing argument to the jury, the State did not make any such careful distinctions. We do not think it likely the jury would have done so sua sponte, in light of how Salyers's acts of resistance comprised one continuous sequence.

We also think it is likely the jury used the same sequence of Salyers's actions to support both convictions because for each conviction, the jury was instructed to find Salyers engaged in violent conduct. Although the jury instructions did not define "tumultuous conduct," the State defined it in closing argument as "conduct that result [sic] in or is most likely to result in serious bodily injury to a person." Tr. at 251. The instructions correctly defined forcible resistance to law enforcement as the use of "strong, powerful, violent means . . . to evade a law enforcement official's rightful exercise of his or her duties." Appellant's App. at 108; see Graham v. State, 903 N.E.2d 963, 965-66 (Ind. 2009) (holding the element of "forcibly" resisting is satisfied when "strong, powerful, violent means" are used to evade an officer's exercise of duties; refusing to present one's arms for handcuffing does not constitute forcible resistance) (quotation omitted). For these reasons, Salyers has demonstrated a reasonable possibility that the

evidentiary facts used by the jury to establish the essential elements of forcibly resisting law enforcement were also used to establish the essential elements of disorderly conduct, and, as a result, Salyers's convictions violate double jeopardy. See Richardson, 717 N.E.2d at 54. The remedy for a double jeopardy violation is to vacate the conviction with the less severe penal consequences. Id. at 54-55. Therefore, we reverse Salyers's disorderly conduct conviction and remand with instructions to vacate the conviction and sentence thereupon.

Conclusion

The trial court did not abuse its discretion in refusing Salyers's tendered jury instructions on police excessive force. Therefore, Salyers's conviction of forcibly resisting law enforcement is affirmed. However, Salyers's convictions of forcibly resisting law enforcement and disorderly conduct violate double jeopardy under the Indiana Constitution. Therefore, we reverse Salyers's conviction of disorderly conduct and remand with instructions to vacate the conviction and sentence thereupon.

Affirmed in part, reversed in part, and remanded.

BAKER, C.J., and BAILEY, J., concur.